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## Surprise! CHRO Advocates for Complainants

Employers and their representatives have been complaining for some time about how pro-employee Connecticut's Commission on Human Rights and Opportunities has become. Firms like ours have noted that even flimsy or clearly groundless cases against our clients routinely are being retained for a full investigation based on the CHRO's merit assessment review process. Now we have confirmation that the CHRO doesn't even pretend to be neutral or objective.

An experienced investigator, who has been with the agency for many years, told one of our lawyers that at a recent training session it was stated that the CHRO advocates for complainants, and that anyone who wasn't comfortable with that was working at the wrong place. This was a surprise to the investigator and to us, because for most of its history the agency was viewed by staffers and others as an objective decision-maker.

It also suggests that employers should consider making a few adjustments in how they deal with discrimination charges. First, a detailed written response to the initial complaint, based on comprehensive investigation and research, may be a waste of time and money. If the case is going to

be retained for fact-finding and mediation anyway, a thorough answer before those steps occur just gives the opposition a free look at every aspect of your defense.

In mediation and possibly fact-finding, the employer may get a chance to pin down the complainant's story before presenting documents or testimony that undermine or refute his or her claims. Also, in mediation, employers should be aware that the mediator may be trying to broker a settlement that reflects the most that he or she can get for the employee, rather than what the case is actually worth.

The fact that the merit assessment review process apparently is a sham is deeply disappointing to employers and their representatives who have put a lot of time and effort into it, mistakenly assuming that strong facts and a convincing argument should result in dismissal of a groundless complaint. We always knew that if a bias claim was determined to have merit, the CHRO would pursue it on behalf of the complainant, even if he or she was represented by private counsel. What we didn't know was that the CHRO was our adversary from the moment a complaint was filed.

**Our opinion** is that the Governor may have had it right a while back when he proposed a Plan B in case the state employee unions wouldn't agree to "concessions" sufficient to balance the state's budget. That alternative was based in part on the elimination of several state agencies, including the CHRO.

## HealthBridge Strike Takes Yet Another Twist

The nine-month-old strike at five Connecticut nursing homes is like a law school exam on various labor relations concepts, and just when it began to look like the union (District 1199) would pass the exam with flying colors, a bankruptcy judge tuned the tables on them.

As is so often the case in collective bargaining these days, HealthBridge (the New Jersey company that owns the five nursing homes) was looking for wage and benefit concessions from the union. After 17 months of fruitless negotiations, it announced unilateral reductions in wages and benefits, including big increases in health insurance contributions and elimination of paid meal breaks.

The union filed charges with the NLRB, alleging that HealthBridge had not bargained in good faith to a bona fide impasse before making

the changes. The Hartford office of the NLRB agreed, and obtained a federal court injunction requiring the restoration of the status quo ante while the issue was litigated before an administrative law judge. The appeals court refused to stay that order, and two Supreme Court justices each denied requests for them to intercede, rejecting claims that patients would be at risk because some strikers had allegedly engaged in sabotage when the strike began.

Just when it seemed HealthBridge had no choice but to reinstate the strikers under their former wages and benefits, a bankruptcy judge in New Jersey stepped in and ruled that the nursing homes were in danger of insolvency if they did not get some labor cost relief. Therefore, at least for the time being, he authorized HealthBridge to employ union workers on the same basis that has applied to non-union employees since 2011, including no pay for lunch periods, no daily overtime, reductions in sick leave and personal time, and changes in health insurance, pension contributions, tuition reimbursement and uniform allowance.

The union's reaction was that the bankruptcy judge couldn't effectively overrule the NLRB and the federal courts, and an NLRB spokesperson said they were considering an appeal. However,

as we go to press the bankruptcy ruling has been in effect for a month already, and there have been no reports of further

legal action by either the Board or District 1199 as yet.

**Our opinion** is that HealthBridge dodged a bullet. Today's NLRB almost always finds some basis for concluding that union contract negotiations have not reached an impasse, and that unilateral employer action is therefore not permitted. While some federal courts have started to challenge NLRB action when it is not supported by law or logic, or flies in the face of the Board's own precedent, overturning any government agency decision is always an uphill fight. However, any claim by District 1199 or the NLRB that a bankruptcy court can't exercise its normal powers when its ruling has an impact on the Board's processes is also a long shot. We look forward to the next chapter in this saga.

## Whistleblower Claims on the Rise

Some time ago, we reported that retaliation claims were getting more common. For example, an employee who filed a discrimination complaint might be unsuccessful in proving that charge, but then claim he or she had been retaliated against for filing it. Recently, it seems a popular variation on that theme is a complaint that an employee has been fired or otherwise retaliated against for reporting some kind of misconduct. The common term for such activity is "whistleblowing."

Here are two examples of claims our firm is currently defending. In one case, a nursing home

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employee claimed she was fired for reporting sexual abuse of a patient. A Superior Court judge ruled that she had stated a valid claim of retaliation, even though she was not acting as a member of the public, since reporting abuse was part of her job responsibilities. In another case, an employee claimed retaliation because she was fired after reporting nursing home safety concerns, even though her report was to a manager at the nursing home rather than a public official, and even though such reports were part of her basic responsibilities.

The lesson is that proving such claims may not be easy, but simply asserting them is enough to force an employer to prove there were valid reasons for its action. However, the employee has to be able to show some statutory protection for blowing the whistle. For example, a Catholic school employee in Montville reported to the headmaster that a football coach was showing up for work drunk, and the reporter was fired shortly thereafter. When he filed a whistleblower complaint, a Superior Court judge ruled there was no statutory protection for reporting such conduct, and no clear public policy exception to the at-will employment doctrine that prohibited his dismissal.

**Our opinion** is that such distinctions are hard to justify. Either employees should be protected against retaliation for reporting in good faith what they honestly believe to constitute serious wrongdoing, or they shouldn't. Drawing fine lines

between reports of misconduct that are encouraged under the law and those that aren't serves no purpose other than full employment for lawyers.

## Public Pensions No Longer Untouchable

Years ago, when it was discovered that certain New Britain police officers and firefighters paid the personnel department to falsify promotional test results, the only advice we could offer about cutting pension benefits paid to terminated employees was that the city could reduce its payments to the level that would apply if the employees had retired at the rank they held before they bought their promotion.

Now there's a new Connecticut law, enacted after Governor Rowland left office in disgrace, that allows the reduction or elimination of state or local government pension payments to those convicted of theft of public funds. It has only been invoked a handful of times, but in theory it could be a powerful deterrent.

Recently a Redding road superintendent was sentenced to three months in jail for pocketing the proceeds from selling some aging town equipment, but now the Attorney General's office is pushing for revocation of his pension, which amounts to over \$25,000 a year. The same law has been used to eliminate the pensions of a Salisbury clerk and an Oxford tax collector.

The most prominent politician facing pension revocation is former Hartford mayor Eddie Perez, who could lose his annual payments of more than \$27,000. His lawyers have argued that his offenses occurred before the law was enacted, but the trial judge pointed out that he was convicted after the statute took effect. Since Rowland was convicted before that date, his pension was not at risk.

The law raises some interesting questions. Is it fair to take back the pension of someone convicted of stealing public funds, but not touch the pension of someone who commits some other heinous offense? Would the law apply to



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someone who cheats on a promotional exam, and thereby gets a raise that he or she did not earn? Doesn't pension revocation punish an offender's family as much as the guilty employee? What if the pension amounts to multiples of what the employee stole? The statute apparently allows judges to take all these factors into consideration before rendering a decision.

**Our opinion** is that like most laws, this one isn't perfect, but at least it gives the justice system a possible option that wasn't available back in the days of the New Britain scandal, and that may be an appropriate penalty in certain circumstances. Given the constraints on state and local budgets these days, the last thing we need is to be paying generous pensions to those who don't deserve them.

## Legal Briefs and footnotes...

**Discrimination Definition:** You'd think that judges have enough work already without creating new causes of action. However, it seems we're always reporting on new kinds of employment discrimination claims the courts have recognized. A Connecticut court recently ruled that bias against a straight male because he exhibits effeminate mannerisms constitutes discrimination based on sex. Similarly, the federal appeals court with jurisdiction over Connecticut has ruled that male-on-male crotch-grabbing and similar crude behavior and talk constitutes sexual harassment, even if both harasser and harassee are heterosexual. Who knew?

**Be Careful What You Say:** If you're thinking of terminating an employee for theft or some other moral misconduct, be careful what you say and who you say it to. Unless the employee is caught

red-handed and the circumstances clearly indicate intent to steal, use cautious terms like unauthorized possession of company property, or failure to properly secure patient possessions. We've seen several recent cases where terminated employees sued for defamation. While there's a qualified privilege for communications between managers, it is not without limits. In a recent case involving a Fairfield nursing home, a judge said a false allegation of theft by a nurse practitioner who had a patient's medicine in her pocket was "extreme in degree, outrageous in character and intolerable in a civilized society," justifying damages for infliction of emotional distress.

**Bad Timing Not Always Fatal:** Some people think if an employee has just filed a workers comp claim, or just complained to a government agency, or just engaged in some other protected conduct, the employee is untouchable when it comes to discipline or discharge. That's not necessarily so. For example, a food service worker was fired for poor performance shortly after announcing she was pregnant, and claimed the employer's reference to her poor performance was a pretext for retaliation. The federal appeals court that covers Connecticut said that while close temporal proximity between her announcement and her discharge was enough to make out a prima facie case, it was insufficient without some other proof to show pretext.

**Arbitral Ambiguity:** A First Student school bus driver in the Trumbull school district was fired after allowing her son to ride her bus, allegedly with a knife. Her union took her discharge to arbitration, and the arbitrator ordered her reinstated to her former position with back pay and a warning. Since Trumbull didn't want her back, First Student assigned her to a route in another town. The union went to court, claiming "former position" meant Trumbull. A federal judge ruled the award was ambiguous, and remanded the case to the arbitrator with instructions to clarify his intent.

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